United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILFRED JOHNSON,

Appellant,

- against -

ROY F. BOMBARD, Superintendent,
Green Haven Correctional Facility,

Appellee.

76-2030

Docket No. 76-2030

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P/S

BRIEF FOR APPELLANT

AN APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

WILFRED JOHNSON
Fishkill Correctional Facility
Beacon, New York

JEROME ROSENBERG
Of Counsel

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QUESTION PRESENTED

1. Was the identification procedures in this case below due process levels? In connection thereof did the court commit error to hold, that the illegality and inadequacy of identification evidence and procedures, amounted to state evidentiary questions not reaching constitutional violations?

2. Was the prejudicial comments committed by the prosecutor during summation, which comment's the court sanctioned deprive appellant of a fair trial?

STATEMENT PURSUANT TO RULE 28(a) (3)

This is an appeal from an order of the United States District Court for the Eastern District of New York (the Honorable Leo F. Rayfiel) entered on November 10, 1975, denying without a hearing appellant's petition for a writ of habeas corpus.

On December 12, 1975, the District Court granted a certificate of probable cause and leave to appeal in forma pauperis and by order dated June 7, 1976, this court granted appellant an extension of time to file pro se briefs by June 8, 1976, This appeal has been perfected with the legal assistance of Jerome Rosenberg, who is acting on behalf of appellant as next of friend and counsel without fee.

STATEMENT OF FACTS

On December 28, 1972, an indictment was filed in Supreme Court, Kings County, charging appellant with armed robbery of an A & P supermarket located in Brooklyn, New York.

A. Pre-trial hearing

Prior to trial, appellant moved to suppress any incourt identification testimony, arguing that the pretrial identi-

fication procedures employed had been so unnecessarily suggestive as to create a substantial likelihood or irreparable misidentification.

At the pre-trial hearing, Detective James Stewart testified that on November 13, 1972, Sam Di Giose and John Tooze, employees of the A & P supermarket, were shown hundreds of photographs of individuals and that Di Giose selected appellant's as being a picture of one of the robbers (S4-5).* The detective then took this photograph and four others to the A & P supermarket and showed them to Pauline Camperchio, another employee of the market, who had been present during the robbery (S6). Comperchio also selected appellant's photograph (S7). Further, the detective testified that on December 19, 1972, a line-up was held in the stationhouse, and as a result, Comperchio identified appellant as one of the individuals who had robbed the supermarket (S10). Later that day, Di Giose was shown a photograph of this line-up** and although he was uncertain (S11; S27; S55-56), again selected appellant (S11). Appellant, who had remained at the sta-

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* Numerals in parentheses preceded by "S" refer to pages of the transcript of the suppression hearing held in State Court on September 24, 1973. The minutes of this hearing may be found in Respondent's Brief and Appendix filed as part of the Record on Appeal.

** The detective testified that another line-up was not conducted because the members of the line-up had been "dispersed" (S11). There was no allegation that the line-up itself or the photographic displays were suggestive.

tionhouse after the corporeal line-up, was then directed by the detective into a room with a two way mirror. Di Giose viewed appellant through the mirror and requested that appellant put on a jacket* and say "Give me all your money, this is a stick up?", words spoken by one of the robbers (S12; S28; S68; S74). After this show-up, Di Giose was sure that appellant had committed the robbery (S12; S56).

Pauline Comperchio and Sam Di Giose also testified at the hearing, confirming Detective Stewart's version of the identification procedures.

B. The trial

At trial, Di Giose described the robbery. He stated that on November 13, 1972, at approximately 8:55 a.m., two men entered the supermarket and that one held a revolver. The person with the gun then directed Di Giose to the store safe in the manager's booth. There the robber demanded and was given money which was kept in the safe and in Di Giose's desk, as well as cash in one of the registers. The robbers then left (T23-24).**

At trial, Di Giose identified appellant as the robber with the gun (T24-25). On cross-examination, Di Giose was

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* The testimony at the hearing indicated that one of the robbers wore a leather jacket (S28; S34; S37; S56; S67-68).

** Numerals in parentheses preceded by "T" refer to pages of the trial transcript dated September 26, 1973.

questioned about the show-up which had occurred in the stationhouse (T39-41). During further questioning, the prosecutor elicited the fact that prior to the show-up Di Giose had been shown a photograph of the line-up and had identified appellant from the photograph (T43-44). Pauline Comperchio also testified at trial, describing the robbery and identifying appellant as the person with the gun (T65).*

The theory of the defense was that Comperchio and Di Giose had identified the wrong person. In support of this theory, appellant's wife testified on appellant's behalf. She stated that since at least 1954, appellant had tatoos on the fingers of both hands which collectively spell "true love" (TT4).** The state's witnesses had previously testified they had not noticed any tattoos on the hands of the robber (T41-42; T52; T73).

During summation, the Assistant District Attorney stated:

> Look at the defendant, judge for yourself, get the aura of arrogance of this defendant.
>
> (TT32)

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* In addition, Ann Ruta and John Tooze, employees of the supermarket, testified as part of the State's case. Both confirmed that a robbery had occurred on Noverber 13, 1972. However, Ruta testified that she could not see the robber's face (T51), and Tooze stated that although he saw the robbers enter the store (T57), he did not see the actual robbery occur.

** Numerals in parentheses preceded by "TT" refer to pages of the trial transcript dated October 1, 1973. Specifically, appellant's wife testified that across appellant's right hand was the word "true" and on the left, the word "love."

Defense counsel's objection and motion for a mistrial were denied. The Assistant District Attorney repeated:

> Look at this defendant. See the aura, the absolute aura of arrogance.
>
> (TT32)

Again, defense counsel's motion for a mistrial was denied (TT32).

After deliberation, the jurors found appellant guilty of Robbery in the first degree and two counts of Grand Larceny. On November 16, 1973, appellant was sentenced to a term of imprisonment of ten years on the robbery count and four years on the larceny counts, all to run concurrently.

C. The Appeal

Appellant raised two issues on appeal in State Court.* First, he contended that reversible error had been committed because the trial court permitted, over objection, Di Giose's testimony that he had previously identified a photograph of appellant.** To support this argument, appellant relied on State cases which hold that it is improper for a witness to testify about an extra-judicial identification of a photograph of a defendant, People v. Griffin,

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* Appellant's brief filed in the Appellant Division, Second Department was made part of appellant's habeas corpus application and is included in the record on appeal.

** The photograph in question was of the line-up which had occurred in the stationhouse. This issue was not raised in appellant's petition pursuant to 28 U.S.C. Sec.2241, et. seq.

29 N.Y. 2d 91, 323 N.Y.S. 2d 964 (1971); People v. Cioffi, 1 N.Y. 2d 70, 150 N.Y. S. 2d 192 (1956). See Defendant-Appellant's Brief in the Appellate Division, Second Department, at 7-11. Second, appellant argued that the prosecutor's summation was improper and denied appellant his right to a fair trial. Specifically, appellant contended that the prosecutor's statements that the jurors should look at the defendant and "get the aura of arrogance of this defendant" exceeded the bounds of fair comment. See Defendant-Appellant's Brief in the Appellate Division, Second Department at 12-15.

On June 24, 1974, appellant's conviction was affirmed (People v. Johnson, 357 N.Y.S. 2d 1014 (App. Div. 2d Dept.)) and leave to appeal to the Court of Appeals was denied.

D. Appellant's application pursuant to 28 U.S.C. Sec. 2241, et seq.

On October 29, 1975, appellant, pursuant to 28 U.S.C. Section 2241, et seq., filed a petition for writ of habeas corpus. He alleged that:

> The identification procedures under a totality of circumstances in this case fall below Due Process Levels and deprived petitioner of a fair trial under the United States Constitution.
>
> (Petition at 2,5)

In support of this position, appellant relied on Stovall

v. Denno, 388 U.S. 293 (1967); Foster v. California, 394 U.S. 440, 442 n.2 (1969); Palmer v. Peyton, 359 F. 2d 199 (4th Cir. 1966). Appellant also argued that the prosecutor's comment during summation deprived appellant "of due process of law to receive a fair trial within the ambit of the Fourteenth Amendment," the same issue raised on appeal in State Court. See Petition at 8.

Judge Rayfiel denied appellant's application in an opinion dated November 10, 1975. Although the Judge found that appellant contended that the identification procedures leading to conviction constituted a denial of due process (Appellant's Appedix B at 1), the District Court held that the contentions relating to the "illegality and inadequacy of identification evidence and procedures 'present evidentiary questions which do not rise to the significance of constitutional violations.'" Appellant's Appedix B at 2. The District Court also found that the Assistant District Attorney's comments on summation did not constitute a denial of due process or a fair trial. Appellant's Appendix B at 4.

ARGUMENT

POINT I

THE IDENTIFICATION PROCEDURES UNDER A TOTALITY OF CIRCUMSTANCES IN THIS CASE FALL BELOW DUE PROCESS LEVELS AND DEPRIVED APPELLANT OF A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT.

The identification procedures which occurred in this case were outrageous, they defy the minimum by law rendering such procedures unconstitutional. In Stovall v. Denno, 388 U.S. 293 (1967), the Supreme Court declared that it was "a recognized ground of attack upon a conviction" that an identification procedure, "was so unnecessarily suggestive and conducive to irreparable mistaken identification that (the defendant) was denied due process of law" and that "this is a recognized ground of attack upon a conviction independent of any right to counsel claim." 388 U.S. at 302, See also Foster v. California, 394 U.S. 440, 442, n. 2 (1969). In so doing, the court acknowledged the importance of principles enunciated in Palmer v. Peyton, 359 F. 2d 119 (4th Cir. 1966). In that case the court declared:

> A state can not rest a criminal conviction on evidence secured by a process in which the search for truth is made secondary to the quest for a conviction... . In their understandable zeal to secure an identification the police simply destroyed the possibility of an objective

> impartial judgment. . . . Such a procedure fails to meet "those canons of decency and fairness" established as part of the fundamental law of the land. 359 F. 2d 202

The court went on to say in a footnote: "We conclude that the entire atmosphere surrounding the identification was a violation of due process." (Footnote 11 at 202)

The rationale of Stovall v. Denno, supra, is that evidence must be suppressed not only when it is acquired in violation of specific guarantees of the Bill of Rights, but also whenever police procedures used to obtain it create a grave risk that it is unreliable. This was the situation in the instant case. The actions taken by the police, regardless of their intentions, clearly rises to the level of abuse which cannot be tolerated when viewed in the context of due process of law.

In the case sub judice, the defendants photograph was identified by two of the states witnesses, both of whom, never had occassion to meet defendant prior to his being accused of the alleged crime. The remaining eye witnesses could not make an identification by photograph, or even, without modification of defendants appearance by the police officials soliciting and badgering them into such identifi-

cation.

The two witnesses who made their identification by photograph were completely uncertain. The persistance of the police officials determined to make an arrest regardless of defendants guilt or innocence made alterations of defendants appearance in the presence of the witnesses and had him on display like a trained pet. When these alterations proved to be insufficient defendant was given phrases to repeat like some ham actor struggling for existance. State v. Wright, 161 S.E. 2d 581: Rape defendants waiver of counsel in connection with line-up did not carry over to later show-up at which he was required to put on a hat and repeat certain words allegedly spoken by the rapist; Foster v. California, supra; suggestive elements in identification proceedings deprive defendant of due process of law; Palmer v. Peyton, supra, procedure which destroys possibility of objective impartial identification violates due process and bars use of the identification at trial.

When a positive identification could not be made by viewing a suspect after a photograph-identification by the same person, a question arises. "Did these two witnesses select this defendants photograph through police implication?" Even though both of the identifying witnesses selected this defendant by photo, they could not identify him as the perpetrator of the crime without the, sometimes brutal, zealous methods of the

police, and we must take notice, no one identified any tatoos.

In addition, what really places this identification so far out of perspective is that the defendant has identifying marks on the back of both of his hands. During the commission of the crime such identifying marks could not be overlooked. These eye witnesses were on the scene of the crime and testified that at no time did they see any tatoos on the hands of the person who actually committed the crime. However, this defendant has tatoos on the back of his right and left hands which could not be overlooked. These identifying tatoos have been on defendants hands for many years as testified to at trial.

The entire realm of this identification deprived defendant of of even a minimum of fairness at trial. Certain types of official misbehavior require reversal simply because society cannot tolerate giving final effect to a judgment tainted with such intentional misconduct. In this case such conduct has been met to the propositions of fact and law we have advanced. Appellant was deprived of due process.

The District Court's opinion held in point, that the lack of the witnesses to identify the tatoos goes to the credibility of witnesses at the trial, and the weight to be gi-en to their testimony, and in substance present evidentiary questions which do not rise to the significance of constitu-

tional violations, and is not a ground for federal habeas corpus relief.

However, the Court's opinion failed to discuss the relationship between the state evidentiary common law rule and that constitutionally mandated by due process. No one for one correlation exist between state evidentiary questions and due process. The analysis of the district court equating the evidentiary common law rule and the due process clause was in error.

No good reason appears why a conviction based on highly untrustworthy testimony falling below reasonable doubt standards going directly to the lack of evidence and appellant's innocence should be immune to constitutional attack. The entire evidence in this case was the testimony of identification. We feel we may say in all fairness that our claim which involves the suggestiveness of the identification procedures utilized in this case and specifically whether the show-up in the stationhouse, in light of the totality of the circumstances, created a substantial likelihood of irreparable misidentification,* coupled with the trial testimony where both witnesses failed to testify to the tatoos, rises to constitutional infirmities. Where the precise issue above was never raised in the state court's and there is a failure to exhaust state remedies, our point involving the trial testimony in point to the outrageous and untrustworthy identification

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* See Neil v. Biggers, 409 U.S. 188 (1972)
See U.S. ex rel Gonzales v. Zelker, 477 F.2d 797,801 (2d Cir. 1973)

warrants this court to evaluate the entire issue since the factual contents fall into the crucial issue of identification. The doctrine of exhaustion of state remedies is only a rule of comity and need not be mechanically applied.

The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a nation. The demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, 'though' its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798. The reasonable-doubt standard plays a vital role in the scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence - that bed-rock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law". Expressions in opinions of the supreme court and various federal courts indicate that proof of a criminal charge beyond a reasonable doubt is "constitutionally" required. See, for example, Miles v. United States, 103 U.S. 304, 312 (1880).

In this instant case, the trial record is totally devoid of evidence except for the erroneous admission of the tainted identification testimony, which in itself is in the true sense of the term, dilute. As the supreme court said, in re Winship,

397 U.S. 358.

> " Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. "

We respectfully submit the identification of appellant and the procedures utilized in this case which reflect the evidence fall's below the rule of reasonable doubt, violates Due Process, deprived appellant of a fair trial and rises to constitutional standards, cognizable under Federal Habeas Corpus for relief.

POINT II

THE PREJUDICIAL COMMENTS AGAINST APPELLANT BY THE PROSECUTION IN SUMMATION, AND FURTHER SANCTIONED BY THE COURT, DEPRIVED APPELLANT OF DUE PROCESS OF LAW TO RECEIVE A FAIR TRIAL WITHIN THE AMBIT OF THE FOURTEENTH AMENDMENT.

When the prosecution exceeds the bounds of their authority and brings into play unethical and prejudicial statements to a jury which he has formulated in his own mind, one would wonder whether the end justified the means. While it can be said, the improper summation falls within the ambit of state evidentiary matters, it formulates into a federal issue and due process.

The following analogy is one of the prevailing courses of action, (circumstances), which predominated this defendants right to a fair trial, and a blatant denial of his constitutional rights. People v. Canty, 299 N.Y.S. 2d 524; Desmond v. United States, 345 F. 2d 225.

The defendant in this case does not reach the status in society that the President or Vice-President hold, but surely his status as a citizen deserves some consideration. To deny this petition would be to deny fundamental fairness at trial in a constitutional sense, which it is submitted constitutes a grevious deprivation of those constitutional rights enjoyed by the people. There is no double standard of justice, which brings into play the age old adage: "One law for Athens, and one law for Rome".

The degree of the harm already caused cannot be eradicated, however, in the furtherance of justice can be corrected.

In the case at bar, the prosecutors disregard of defendants rights, should not have distorted "unfactual" implications, which he emulated on his own, to arrive at his conclusion, one way or another, that the defendant was arrogant and guilty: "Look at the defendant, judge for yourself, get the aura of arrogance of this defendant." Samuels v. United States, 398 F. 2d 964, 531. Cf. Fuller v. District of Columbia, 204 A. 2d 812; (prosecutors improper remarks required reversal); Gradsky v. United States, 373 F. 2d 706; (Prosecutor's expression of opinion as to government witnesses' credibility constituted reversable error). See also: United States v. Schartner, 426 F. 2d 470 (1970); United States v. Lamerson, 457 F. 2d 371 (5th Cir. 1972); Downie v. Burke, 408 F. 2d 343 (1969).

It is well known that the people look towards all prosecutors as being of good moral character, in that, their duties encompass protecting the people. A statement such as that, supra, does in fact create hostilities towards a defendant. What juror would look at the prosecutor as being anything but pure and righteous? Defense counsel made a timely objection to this statement which the court overruled. The prosecutor again reiterated similarly, "look at this defendant, see the aura, the absolute aura of arrogance", further compounding the preju-

dice. Again defense counsel objected to no avail. It is the duty of the trial judge to protect the rights of an accused. Fay v. Noia, 372 U.S. 391.

It is well established that when a defendant does not testify, his character does not come into play. To do so is well beyond constitutional bounds of permissibility.

A prosecutor enjoys a powerful hold on the judicial body in his opinions. What greater hold would he enjoy over the jury who are totally lacking in the concept of justice? With this in mind, all one has to do is place oneself in a jury box to determine whether a different conclusion would have been determined.

The duty of the prosecuting attorney is to seek justice, not another notch on his desk for a conviction. By his (the prosecutors) statements in summation against the defendant, he has caused prejudice, unfairly, in the minds of the jurors.

The conduct of the prosecutor in this case calls into question the very integrity of the judicial process.

Thus a picture emerges of prosecutorial tampering with the integrity of the fact-finding process. If any question whatever remains, whether the prosecutors misconduct did not influence the verdict by verdict by his improper remarks, the burden of proof must now rest on the government. Cf. Harrison v. United States, 392 U.S. 219, 225 n. 12 and accompanying text

(1968).

In Chapman v. California, 386 U.S. 18 (1967), the court recognized that infraction of certain constitutional rights "can be treated as harmless error." 386 U.S. at 34-34. The three due process violations cited in Chapman as per se reversible errors were: (1) introduction of coerced confession into evidence; (2) deprivations of the right to counsel; and (3) deprivation of the right to an impartial judge. The three violations mentioned by the Court, just as the violation in the instant case, all concern the most fundamental kinds of damage to the integrity of the fact-finding process essential to our system of criminal justice. In contrast, the Court in Harrington v. California, 395 U.S. 250 (1969), decided that violation of the right of confrontation as applied to admission of a non-testifying co-defendant's confession was in the circumstances of the case harmless error. While denial of this right in a Burton situation is a serious defect in the trial (See Roberts v. Russell, 392 U.S. 293 (1968), prosecution misconduct is a far more serious fault. It produces inherently unreliable results. More important, it involves official lawlessness of the most repugnant sort and undermines public confidence in the integrity of our system of justice. The Court has recognized that the degree of actual prejudice to a defendant which must be demonstrated to obtain a new trial varies inversely with: (1) the extent to which the constitutional defect has "violated basic concepts of fair play" and (2) "the

need to deter future violations." Kyle v. United States, 297 F. 2d 507 (1961).

The issue to some, may seem picayune. However, basically it presents a substantial question of whether senseless medieval practices can be allowed, and upheld, totally disregarding defendants rights.

This petition is to bring to the attention of the court that the prosecutions statements against the defendant were in extreme opposition to defendants rights guaranteed him by the United States Constitution depriving him of a fair trial, fatally infecting the fact finding process.

The prosecutors attempts to influence the jury by prejudicial comments was clever indeed, but this only establishes the fact that the case against petitioner was weak. The prosecutions tactics were designed to place appellant in a "showcase" sort of presentation, that appellant was evil, which only proves that the factual evidence the state had was in the dilutest sense of the term, minute, to sustain a conviction. In Donnelly v. DeChristoforo, 416 U.S. 637 (1974), the Supreme Court dealt with a claim similar to that presented here. There the prosecutor expressed a personal opinion about the defendant's guilt and made a comment which the jurors could have interpreted as indicating that the defendant had already admitted guilt to the prosecutor in an attempt to secure reduced charges. Donnelly v. De Christoforo, supra , 416 U.S. at 642. The Supreme

court while not approving of these comments, held that they were trial errors, not amounting to a denial of due process. Donnelly v. DeCristoforo, supra, 416 U.S at 647, 648 n 23. In light of Downee, supra; and the Suprem Court's decision in Donnelly, supra, it is clear, that in the context of this trial, the prosecutor's comments did constitute a due process violation.

The record clearly established the lack of evidence against appellant, therefore where we have at the most only the merest shred of tainted evidence - the alleged identification - fairness and justice require that the closest appellate scrutiny be devoted to ascertain whether the prejudicial comments and the misconduct of the prosecution, constituted in this case, prejudicial error. The test is, can this court say beyond a reasonable doubt, that the prejudicial comments in this case did not contribute to the verdict.

We submit appellant was deprived of a fair and impartial trial under Fourteenth amendment strictures.

CONCLUSION

Appellant was deprived of a fair trial as mandated by the due process clause of the Fourteenth Amendment. To sustain a conviction resting on such foundation would be shocking. For the foregoing reasons, the order below should be reversed and writ issued forthwith.

Respectfully submitted,

DATED:

June 18, 1976

Wilfred Johnson
Appellant Pro se
Fishkill Correctional Facility
Beacon, N.Y. 12508

UNITED STATES COURT OF APPEALS
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WILFRED JOHNSON,
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-against-

ROY BOMBARD, Superintendent,
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Appellee.

AFFIDAVIT OF SERVICE

76-2030

STATE OF NEW YORK)
) ss..
COUNTY OF DUTCHESS)

Jerome Rosenberg, being duly sworn deposes and says:

That he has forwarded via United States Mail a copy of said papers filed with this court attached, to:

Attorney General for the
State of New York
Two World Trade Center
New York, N.Y.

Jerome Rosenberg

Jerome Rosenberg
of Counsel
Drawer B
Stormville, N.Y. 12582

Sworn to before me this
21st day of June, 1976

Esmond W. Gifford Sr.

ESMOND W. GIFFORD, SR.
Notary Public, State of New York
Dutchess County
Commission Expires March 30, 1977